

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEXTER G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. C19-6074 RAJ

**ORDER REVERSING THE
COMMISSIONER'S DECISION
AND REMANDING FOR AN
AWARD OF BENEFITS**

Plaintiff appeals denial of his applications for Supplemental Security Income and Disability Insurance Benefits. Plaintiff contends the ALJ erred by discounting his testimony and failing to account for all limitations caused by his eye impairments. Dkt. 9. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for an award of benefits under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff is 54 years old, has a high school education, and has worked as a medical social worker, case worker, nurse assistant, and medical assistant. Dkt. 7, Admin.

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1 Transcript (Tr.) 344. Plaintiff alleges disability as of November 1, 2012. Tr. 15.
2 Plaintiff's applications were denied initially, on reconsideration, and by an ALJ decision
3 in 2015. Tr. 15-24. On appeal to this court, based on the parties' stipulation, the ALJ's
4 decision was reversed and the case was remanded for further administrative proceedings.
5 Tr. 648-49. On remand, after conducting a hearing in May 2019, the ALJ issued a
6 decision finding Plaintiff not disabled. Tr. 554-98, 335-45. The ALJ found Plaintiff had
7 several eye impairments, including dry eye syndrome, eye pain, photophobia, and corneal
8 scarring and abrasion, resulting in visual limitations to his Residual Functional Capacity
9 (RFC). Tr. 338, 339.

11 DISCUSSION

12 This Court may set aside the Commissioner's denial of Social Security benefits
13 only if the ALJ's decision is based on legal error or not supported by substantial evidence
14 in the record as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

15 A. Plaintiff's Testimony

16 Where, as here, an ALJ determines a claimant has presented objective medical
17 evidence establishing underlying impairments that could cause the symptoms alleged,
18 and there is no affirmative evidence of malingering, the ALJ can only discount the
19 claimant's testimony as to symptom severity by providing "specific, clear, and
20 convincing" reasons supported by substantial evidence. *Trevizo*, 871 F.3d at 678.

21 Plaintiff testified he rests his eyes frequently throughout the day to preserve his
22 optic nerve function. Tr. 584-86. He has a routine of using medication for dry eyes
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1 every hour and then closing his eyes for 15 to 20 minutes. Tr. 585. The ALJ found
2 Plaintiff's testimony contradicted by medical expert W. Benton Boone, M.D., who
3 testified the medication does not cause blurred vision for up to 15 minutes. Tr. 342, 570.
4 "Contradiction with the medical record is a sufficient basis for rejecting a claimant's
5 subjective testimony." *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th
6 Cir. 2008). Dr. Boone's testimony does not, however, contradict Plaintiff's testimony.
7 Plaintiff did not testify that the medication causes 15 minutes of blurry vision, but that he
8 maintains his routine in order to rest his eyes and preserve optic nerve function. Plaintiff
9 testified he has recovered some vision in his left eye by not overtaxing his eyes, on his
10 doctor's orders. Tr. 579, 583-85. Plaintiff also testified that, when he is experiencing an
11 exacerbation of dry eyes, it may take 10 to 15 minutes of closing his eyes after putting
12 medication in before the "burning, and scratchy," feeling subsides. Tr. 586. The ALJ
13 noted Dr. Boone testified closing eyes helps with pain and irritation from dry eyes, which
14 supports rather than contradicts Plaintiff's testimony. Tr. 342, 572. Contradiction with
15 the medical record was not a clear and convincing reason to discount Plaintiff's
16 testimony.
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18 The ALJ noted "some improvement" in Plaintiff's dry eye symptoms with
19 treatment. Tr. 341. Impairments that can be "controlled effectively" by medication or
20 treatment are not considered disabling for purposes of determining Social Security
21 eligibility. *See Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.
22 2006). However, the evidence here does not show improvement rising to the level of
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1 effective control of Plaintiff's impairments. A May 2014 treatment note reported
2 "slightly improved symptoms from dry eye treatment" and prescribed resting his eyes as
3 needed "as it improves his symptoms." Tr. 278. Topical anesthetic reduced eye pain and
4 photophobia. Tr. 281. In May 2014 Plaintiff reported "some improvement using
5 [artificial tears] hourly." Tr. 288. None of this shows Plaintiff's symptoms improved to
6 the point where he can work or otherwise contradicts Plaintiff's testimony. Improvement
7 with treatment was not a clear and convincing reason to discount Plaintiff's testimony.

8
9 The ALJ discounted claims of poor vision because Plaintiff did not "follow up" on
10 obtaining glasses or contact lenses. Tr. 341-42. There is no evidence, however, that
11 glasses or contact lenses would mitigate Plaintiff's need to close his eyes regularly.
12 Failure to pursue glasses or contact lenses was not a clear and convincing reason to
13 discount Plaintiff's testimony.

14 Based on Dr. Boone's testimony that contact lenses were inappropriate for a
15 patient with dry eyes, the ALJ found Plaintiff must not have reported to his doctors the
16 "level of dry eye that [he] alleged at the hearings." Tr. 342. The ALJ's finding is not
17 supported by substantial evidence. Treatment records show Plaintiff reported dry eyes
18 and his doctors assessed dry eye syndrome. Tr. 327, 330. Dr. Boone testified "usually
19 people who have dry eyes are not going to be successful in using hard contacts." Tr. 573-
20 74. He did not testify that some specific level of dry eye is required before contacts are
21 contraindicated. The ALJ's reasoning also suffers from a failure to distinguish between
22 hard and soft contact lenses. Plaintiff's provider scheduled a "contact lens" appointment
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1 “if [patient is] interested” but did not specify hard contacts. Tr. 287. Dr. Boone’s
2 testimony did not provide a clear and convincing reason to discount Plaintiff’s testimony.

3 The ALJ discounted Plaintiff’s testimony because he worked “prior to the alleged
4 onset date ... despite ... corneal damage to the left eye ... in 1991 and ... a corneal
5 transplant to the right eye in 2006.” Tr. 341. Impairments are not disabling if they have
6 “remained constant for a number of years and ... not prevented [a claimant] from
7 working over that time.” *Gregory v. Bowen*, 844 F.2d 664, 667 (9th Cir. 1988). Here,
8 however, the ALJ found since the alleged onset date Plaintiff had several severe
9 impairments in addition to the corneal damage, including dry eye syndrome, eye pain,
10 photophobia, glaucoma, drusen, and keratoconus. Tr. 338. Because Plaintiff’s
11 impairments have not remained constant, his ability to work before the alleged onset date
12 was not a clear and convincing reason to discount his testimony.
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14 The ALJ found Plaintiff’s testimony inconsistent with his activities. Tr. 342-43.
15 An ALJ may discount a claimant’s testimony based on daily activities that either
16 contradict her testimony or that meet the threshold for transferable work skills. *Orn v.*
17 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). “Only if the level of activity were inconsistent
18 with Claimant’s claimed limitations would these activities have any bearing on
19 Claimant’s credibility.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.1998). The ALJ
20 cited taking a bus from Louisiana to Washington, using a microwave, listening to the
21 radio, talking on the phone, using a touch screen phone, taking out the trash, shopping in
22 a familiar store, taking a city bus, and walking for exercise in the morning before it gets
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1 too bright. Tr. 342-43. Neither the ALJ nor the Commissioner has explained how these
 2 activities are inconsistent with closing his eyes 15 minutes per hour. The Commissioner
 3 argues the activities are inconsistent with Plaintiff's claimed "difficulty using his eyes for
 4 more than 15 minutes." Dkt. 10 at 6 (citing Tr. 579). However, it was only during vision
 5 tests, which require maximum visual effort, that Plaintiff testified "after ten, 15 minutes
 6 of going through those tests, [visual acuity] starts to get worse and worse." Tr. 579. In
 7 normal day-to-day activity, after using his hourly medication and closing his eyes for 15
 8 minutes, Plaintiff testified "over the next 45 minutes [he] could do what [he] needed to
 9 do." Tr. 585. Conflict with activities was not a clear and convincing reason to discount
 10 Plaintiff's testimony.
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12 The only remaining reason for discounting Plaintiff's testimony is lack of
 13 supporting objective medical evidence, which the Commissioner concedes is not
 14 sufficient. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The Court
 15 concludes the ALJ erred by discounting Plaintiff's testimony.

16 **B. Scope of Remand**

17 Plaintiff requests the Court remand for an award of benefits or, in the alternative,
 18 for further administrative proceedings. Dkt. 9 at 12-14. Remand for an award of benefits
 19 "is a rare and prophylactic exception to the well-established ordinary remand rule." *Leon*
 20 *v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir. 2017). The Ninth Circuit has established a
 21 three-step framework for deciding whether a case may be remanded for an award of
 22 benefits. *Id.* at 1045. First, the Court must determine whether the ALJ has failed to
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1 provide legally sufficient reasons for rejecting evidence. *Id.* (citing *Garrison v. Colvin*,
2 759 F.3d 995, 1020 (9th Cir. 2014)). Second, the Court must determine “whether the
3 record has been fully developed, whether there are outstanding issues that must be
4 resolved before a determination of disability can be made, and whether further
5 administrative proceedings would be useful.” *Treichler v. Comm’r of Soc. Sec. Admin.*,
6 775 F.3d 1090, 1101 (9th Cir. 2014) (internal citations and quotation marks omitted). If
7 the first two steps are satisfied, the Court must determine whether, “if the improperly
8 discredited evidence were credited as true, the ALJ would be required to find the
9 claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. “Even if [the Court]
10 reach[es] the third step and credits [the improperly discredited evidence] as true, it is
11 within the court’s discretion either to make a direct award of benefits or to remand for
12 further proceedings.” *Leon*, 880 F.3d at 1045 (citing *Treichler*, 773 F.3d at 1101).

14 First, the ALJ failed to provide legally sufficient reasons for rejecting Plaintiff’s
15 testimony. Second, the Commissioner has identified no outstanding issues to resolve.
16 No evidence contradicts Plaintiff’s testimony that he must use medication and rest his
17 eyes, and in fact his treatment records support his testimony. Third, vocational expert
18 testimony establishes the requirement to close his eyes 15 minutes per hour would
19 preclude all competitive employment. Tr. 595. Accordingly, the ALJ would be required
20 to find Plaintiff disabled on remand. Finally, even where all three requirements are met,
21 the Court has flexibility to remand for further proceedings “when the record as a whole
22 creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of

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1 the Social Security Act.” *Garrison*, 759 F.3d at 1021. The Court concludes that the
2 record does not create any such doubt. Accordingly, the Court remands for an award of
3 benefits.

4 **CONCLUSION**

5 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and
6 this case is **REMANDED** for an award of benefits under sentence four of 42 U.S.C. §
7 405(g).

8 DATED this 11th day of June, 2020.
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12 The Honorable Richard A. Jones
13 United States District Judge
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